No. 12809

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERALD G. BOYDEN,

Petitioner-Appellant,

vs.

P. J. SQUIER, Warden,
United States Penitentiary,
McNeil Island, Washington,

Respondent-Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS
United States Attorney
GUY A. B. DOVELL,
Assistant United States Attorney
Attorneys for Appellee.

OFFICE AND POST OFFICE ADDRESS:
324 FEDERAL BUILDING
TACOMA 2, WASHINGTON

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BRIEF OF APPELLEE

QUESTIONS INVOLVED

1. Does the indictment herein in charging appellant and another person with the transportation under the Dyer Act of a single automobile allege an impossible offense, in view of its operation requiring but one person?

2. Is the statute which provides that prosecution for an offense such as under the Dyer Act may be had in the district in which the offense was begun, or continued, unconstitutional, rendering the trial court without jurisdiction and the proceedings therein against appellant and any other so tried invalid and the sentence of each void?

STATEMENT

On January 25, 1950, an indictment containing a single count was returned against Gerald Glenn Boyden, the appellant herein, and another in the Southern Division of the United States District Court for the Southern District of California, which charged the two with the transportation of a stolen automobile from San Diego County, California, to Tiajuana, Baja, California, Mexico, contrary to Title 18 U. S. Code, Section 2312. (R. 1-2). Thereafter, on March 17, 1950, appellant was sentenced to a term of eighteen months imprisonment after trial by jury and conviction of said offense, he being represented by counsel at all proceedings therein, and following which appellant was received at McNeil Island Penitentiary on March 30, 1950, and will be eligible for conditional release on May 31, 1951. (R. 28-32).

The appellant has not been reluctant in accepting the opportunities afforded him to explore grounds

whereby release might be sought. In this connection, appellant has made a motion in the trial court to vacate his sentence and upon its denial has appealed to this court, and this court has since the commencement of these proceedings denied his appeal on the motion and previously denied his application for transcript of the record. (R. 23, 30).

Boyden v. Smith, 183 F. (2d) 189.

In addition to the foregoing, appellant's prior petition for writ of habeas corpus to the District Court was dismissed upon his own motion, (R. 4), and the appellant thereafter, by petition for writ of habeas corpus and pauper affidavit received by the Clerk of the court on September 25, 1950, applied to the Honorable William Denman, Chief Judge of the United States Court of Appeals for the Ninth Circuit, for release from imprisonment, upon grounds as contended for herein, (R. 10-17), which application by judicial order was duly transferred to the United States District Court for the Western District of Washington, and filed therein November 1, 1950. (R. 18).

The appellant lodged his present application for writ of habeas corpus and motion for leave to proceed in forma pauperis on October 27, 1950, with the District Court, (R. 3-9), and appellee was thereupon

ordered to show cause on November 16, 1950, of the detention of appellant. (R. 19-20).

To the order to show cause, appellee filed his response on November 21, 1950 (R. 21-25), and produced in court the body of the appellant at the time to which said return and hearing was continued on November 27, 1950. (R. 28).

The appellant at the time of hearing made oral traverse to appellee's return and confined the issue to the questions hereinbefore stated, (R. 30), whereupon the District Court, after full consideration, (R. 28-32), entered its order denying the application and dismissing the action. (R. 33-34). From that final order appellant has been permitted to appeal in forma pauperis, (R. 26-27, 42-47), and to file as a part of the record herein his Supplementary Brief in support of habeas corpus application. (R. 35-41, 48).

ARGUMENT

I.

THE INDICTMENT IN CHARGING APPELLANT AND ANOTHER WITH THE TRANSPORTATION UNDER THE DYER ACT OF A SINGLE AUTOMOBILE DOES NOT ALLEGE AN IMPOSSIBLE OFFENSE, OR AN OFFENSE CAPABLE OF BEING COMMITTED BY BUT ONE PERSON.

The evidence of transportation of stolen automobiles in interstate or foreign commerce is not confined to the question of who operated the motor vehicle across the state line or border, as appellant would have the court consider in support of his contention that such offense is capable of being committed by but one person, and that any other person in any wise involved should be charged with conspiracy.

By Section 2312, Title 18, U. S. Code, it is provided:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The indictment drawn under the preceding statute charged:

> "On or about January 7, 1950, defendants Gerald Glenn Boyden and George Louis Thompson did transport and cause to be transported a certain stolen motor vehicle, namely: a 1947 Dodge sedan, motor number D24-320635, from San Diego County, California, within the Southern Division of the Southern District of California, to Tiajuana, Baja, California, Mexico; and the defendants then knew the motor vehicle to have been stolen."

Appellant finds further fault (R. 35) with the indictment because of the additional words, to-wit, "and cause to be transported". These words, while they may be considered unnecessary in view of the definition of "principal" in Section 2 of this title and hereinafter cited, do not refer to the method or means of transportation, as appellant contends, nor do they render the language inconsistent. (R. 35, 44).

Accordingly, the statute is as broad as formerly when the Court of Appeals for the Eighth Circuit in *Hagan v. U. S.*, 9 F. (2d) 562, 563 held:

> "This language is sufficiently broad to cover movement either under its own power or where the automobile was carried as freight. A particularization in this respect was not important to the statement of the offense and, therefore, cannot be urged against the sufficiency of the indictment, although a statement of the character of such transportation might have been made more particular had defendant sought to have this done by a bill of particulars."

The decision of the same circuit in the later case

of *Carpenter v. U. S.*, 113 F. (2d) 692 is to the same effect, where the court at page 693 observed:

> "On this appeal we give consideration first to the judgment of conviction upon the first count of the indictment. That count charged the several defendants with violation of 18 U.S.C.A. Section 408 (now 2312), which denounces the interstate (or foreign) transportation of a stolen motor vehicle, knowing the same to have been stolen. The count did not specify the particular part taken by each defendant in the stealing and transportation of the vehicle, but all were indicted as principals who aided and abetted in the commission of the offense."

And the court concluded at page 698 as follows:

> "The proof of guilt on the part of each of the defendants as to the first count of the indictment was in all respects sufficient and their trial having been fair, impartial and without prejudicial error, no grounds for reversal of the conviction on that count has been shown."

The offense it has been held consists of transporting in interstate or foreign commerce, not in the completed journey, from one state or country to another.

United States v. Winkler, 299 F. 832.

This being true, one who transports a stolen car from one state into another and returns to original state has violated the statute.

Hughes v. U. S., 4 F. (2d) 387, cert. den. 268 U. S. 692.

A similar situation is presented where it is held that every carrier who transports goods through any part of a continuous passage in the state to a point in another state is engaged in interstate commerce, whether the goods are carried upon through bills of lading or rebilled by the several carriers.

> *U. S. v. Colorado & N. W. R. Co.*, 157 F. 321, cert. den. 209 U. S. 544.

In the case of *U. S. v. Lento*, 78 F. Supp., 374 the District Court, at page 375 observed:

> "Defendant has filed motions for judgment of acquittal and for a new trial. The former motion is pressed with regard to Counts II, III and V, which dealt with the automobiles described above which defendant did not actually drive across a state line. Defendant's contention is that there is insufficient evidence to support a conviction for transportation of the vehicles involved. However, I feel that the evidence justifies a conclusion that defendant aided and abetted her co-defendants in the transportation of the stolen cars across state lines. Cf. *Backun v. United States*, 4 Cir., 112 F. (2d) 635; *United States v. Harrison*, 3 Cir., 121 F. (2d) 930; *United States v. DiRe*, 2 Cir., 159 F. (2d) 818; *United States v. Pecoraro*, 2 Cir., 115 F. (2d) 245; See *Direct Sales Co. v. United States*, 319 U.S. 703, 713, 63 S. Ct. 1265, 87 L. Ed. 1674. Accordingly, therefore, under 18 U.S.C.A., Sec. 550 it was proper to indict, try, and convict her as a principal. Cf. *United States v. Pritchard*, D.C., 55 F. Supp. 201; *United States v. Rappy*, 2 Cir., 157 F. (2d) 964."

On appeal from a conviction of two defendants

after trial by jury in which each defendant blamed his co-defendant and tried to absolve himself from criminality, the opinion of the Court of Appeals, 8th Circuit, in the case of *Isbell v. United States*, 26 F. (2d) 24, and in the language of the headnote 3, as to the indictment, was as follows:

> "Indictment charging that defendants, in Washita County in the Western District of Oklahoma, did then and there knowingly, willingly, unlawfully, and feloniously transport in interstate commerce from Wichita, in the State of Kansas, into Western District of Oklahoma, a certain Buick automobile, giving the number thereof, knowing said motor vehicle to have been stolen, held sufficient to charge violation of National Motor Vehicle Theft Act (18 U.S.C.A. Section 408)".

In addition, Title 18 U. S. Code, Section 2, supports respondent's position in that it states:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
>
> (b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

On habeas corpus, however, the question is not whether indictment is vulnerable to direct attack, but whether it is so fatally defective as to deprive the court of jurisdiction.

Garrison v. Hudspeth, 108 F. (2d) 733;
Farnsworth v. Zerbst, 98 F. (2d) 541.

In paragraph III of his Supplementary Brief (R. 37), appellant in effect contends that his conviction is not supported by evidence.

As stated in *Casebeer v. Hudspeth*, 121 F. (2d) 914, and 916, appellant is limited in habeas corpus proceedings, by the following rule:

> "It is the general rule that the sufficiency of the evidence to warrant a conviction in a criminal case can be reviewed only on appeal and that it cannot be tested in habeas corpus to effect the discharge of the accused from confinement after conviction but in such a proceeding the sufficiency of the evidence in the criminal case must be conclusively presumed."

See *Gillenwaters v. Biddle*, 18 F. (2d) 206.

Whether the indictment states an offense must be determined from the instrument itself, and not from the testimony nor the conjecture of the appellant.

Minnec v. Hudspeth, 123 F. (2d) 444.

And on habeas corpus unless it appears on the face of the indictment that an impossible or colorless offense has been charged, the indictment must stand.

Rosenhoover v. Hudspeth, 112 F. (2d) 667.

II.

THE STATUTE WHICH PROVIDES THAT PROSECUTION FOR AN OFFENSE SUCH AS UNDER THE DYER ACT MAY BE HAD IN THE DISTRICT IN WHICH THE OFFENSE WAS BEGUN OR CONTINUED IS NOT UNCONSTITUTIONAL, AND PROSECUTION HEREIN PURSUANT THERETO DID NOT RENDER THE TRIAL COURT WITHOUT JURISDICTION NOR THE PROCEEDINGS AGAINST APPELLANT OR HIS CO-DEFENDANT INVALID OR THEIR SENTENCES VOID.

Section 3237, Title 18, U. S. Code, provides:

> "Except as otherwise provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed."
>
> "Any offense involving the use of mails or transportation in interstate or foreign commerce is a continuing offense and except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

Appellant's chief difficulty in accepting the above statute as law lies in the fact that he cannot conceive of a crime being committed in more than one district or state. There is nothing in the lan-

guage of Article III, Section 2, Clause 3, or of Amendment VI of the United States Constitution which supports the view that the commission of a crime is limited to one district. That would be a choice that such offender has so far refused to observe.

Appellant's claim that he was not present in the district at the time does not establish that he did not commit the offense there, nor that the trial court did not have jurisdiction to try him.

See *McBoyle v. United States*, 43 F. (2d) 273, and Supreme Court cases there cited.

See also *Ventimiglia v. Aderhold*, 51 F. (2d) 308.

In *Penny v. United States*, 154 F. (2d) 629, where the ground of the motion to vacate the sentence was that no federal offense had been committed until the stolen automobile had been driven from Virginia into West Virginia and therefore no crime was ever committed in the Eastern District of Virginia, the Court of Appeals, Fourth Circuit, held prosecution in the Eastern District of Virginia was valid and the motion lacking in merit. Such a provision, it was pointed out, has prototypes in many other federal criminal statutes and is clearly valid.

See *Armour Packing Co. v. United States*, 209 U. S. 56, and cases therein cited.

Simmons v. Zerbst, 18 F. Supp. 929 and cases cited.

CONCLUSION

The appellee, therefore, contends that for the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney

Attorneys for Appellee.